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NO. 86-508

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1986

MAXINE L. MASTROPIETRO, PETITIONER

V.

ROBERT ALAN MASTROPIETRO, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPERIOR COURT OF NEW JERSEY,

APPELLATE DIVISION

PETITIONER'S REPLY MEMORANDUM

Daniel Martin, Esq.

RD1 Box 160

Titusville, NJ 08560

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STATUTUES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. N.J.S.A. ARTICLE 6. ALIMONY AND MAINTENANCE

2A:34-23. Alimony; maintenance; custody and maintenance of children; security; failure to obey order; sequestrian; receiver; modification of orders; equitable distribution of property:

Pending any matrimonial action brought in this State or elsewhere, or after judgment of divorce or maintenance, whether obtained in this State or elsewhere, the court may make such order as to the alimony or maintenance of the parties, and also as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just, and require reasonable security for the due

observance of such orders. Upon neglect or refusal to give such reasonable security, as shall be required, or upon default in complying with any such order, the court may award rents and profits of the real estate of the party so charged, and appoint a receiver thereof, and cause such personal estate and the rents and profits of such real estate, or so much thereof as shall be necessary, to be applied toward such alimony and maintenance as to the said court shall from time to time seem reasonable and just; or the performance of the said orders may be enforced by other ways according to the practice of the court. Orders so made may be revised and altered by the court from time to time as circumstances may require. (emphasis supplied)

In all actions brought for divorce, divorce from bed and board, or nullity

the court may award alimony to either party, and in so doing shall consider the actual need and ability to pay of the parties and the duration of the marriage. In all actions for divorce other than those where judgment is granted solely on the ground of separation the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just. In all actions for divorce or divorce from bed and board where judgment is granted on the ground of institutionalization for mental illness the court may consider the possible burden upon the taxpayers of the State as well as the ability of the plaintiff to pay in determining an amount of maintenance to be awarded.

In all actions where a judgment of divorce or divorce from bed and board is entered the court may make such award or

awards to the parties, in addition to alimony and maintenance, to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage. However, all such property, real, personal or otherwise, legally or beneficially acquired during the marriage by either party by way of gift, devise, or intestate succession , shall not be subject to equitable distribution, except that interspousal gifts shall be subject to equitable distribution.

Amended by L.1971, c. 212, sec 8; L.1980, c. 181, sec1, eff. Dec 31, 1980; L.1983, c. 519, sec 1, eff. Jan. 17, 1984.

GOVERNOR'S RECONSIDERATION AND RECOMMENDATION STATEMENT
Assembly, No. 1896-L.1983, c.519

To the General Assembly:

Pursuant to Article V, Section I, paragraph 14 of the Constitution, I

herewith return Assembly Bill No. 1896 (OCR) with my recommendations for reconsideration.

Assembly Bill No. 1896 exempts property received by descent or other distribution from equitable distribution in divorce cases.

Under current law when parties become divorced, the property which they acquired during the marriage is divided between them. The allocation to each spouse of a share of the joint assets is known as "equitable distribution."....

2. N.J.S.A. 9:2-2 CUSTODY OF CHILDREN OF DIVORCED OR SEPARATED PARENTS WITHIN JURISDICTION OF SUPERIOR COURT; REMOVAL FROM JURISDICTION; CONSENT; SECURITY

When the Superior Court has jurisdiction over the custody and maintenance of the minor children of parents divorced, separated or living

separate, and such children are natives of the State, or have resided five years within its limits, they shall not be removed out of its jurisdiction against their own consent, if of suitable age to signify the same, nor while under that age without the consent of both parents, unless the court, upon cause shown, shall otherwise order. The court, upon application of any person in behalf of such minors, may require such security and issue such writs and processes as shall be deemed proper to effect the pruposes of this section.

Amended by L.1948, c. 321, p. 1295, sec 2.

ARGUMENT

Respondent's opposing brief, short as it is, contains several errors which must be brought to the attention of the court:

I Respondent claims that this case does not fall within the guidelines set forth under Rule 17, as to when this court may grant a writ of certiorari. This claim is based upon the fact that this case does not fall into one of the categories of cases listed in 17.1 (a) (b) and (c) where a writ of certiorari may be granted. However, it is very clearly stated in Rule 17, that the types of cases listed in subparagraphs (a)-(c) are "...neither controlling nor fully measuring [of] the court's discretion..." to grant writs of certiorari.

Here, as set forth in the petition itself, petitioner's constitutional

rights were violated by the courts of the State of New Jersey throughout the state court proceedings. A writ of certiorari is clearly available to remedy such violations under 28 USC 1257 (3).

II Respondent mischaracterizes both the facts of this case, and New Jersey caselaw governing this case when he states at page 4 of his opposing brief,

> "This case involves nothing more or less than the unspectacular and rather common attempts to modify a judgment of divorce as changed circumstances occur."

In fact, this is anything but a common case, as the trial court pointed out during oral argument,

> "Obviously, as I have indicated, that is a very unusual provision, frankly, in 9 years on the bench." (PRa2)

Moreover, judgments of divorce in New Jersey are not subject to routine modification whenever changed

circumstances occur. In raising the issue of changed circumstances, respondent has attempted to confuse the standard for modification of custody and support orders under NJSA 2A:34-23, which specifically permits routine modifications whenever changed circumstances occur, with the much stricter standard for post-judgment modification of property provisions of a divorce judgment. It is clear under New Jersey law that an application to modify a property provision of a divorce judgment must be considered under the same strict standard which applies to applications to modify all final judgments, and not under the more liberal standard for modification of support and custody orders. (Ganther v Ganther 153 NJ Super 226 (App Div 1977); Barrie v Barrie 154 NJ Super 301 (App Div 1977); certif. denied 75 NJ 601 (1978))

III Respondent claims at page 4 and again at page 8 of his opposing brief that because he is the custodial parent, petitioner's parental rights are not worthy of protection by the court. Respondent offers no support in either State or Federal law for this contention. In fact, the parental rights of non-custodial parents are protected in New Jersey both by statute (NJSA 9:2-2 set forth above forbids a custodial parent from removing a child from the State without the other parent's consent) and by the holdings of the New Jersey Supreme Court (cf Cooper v Cooper 99 NJ 42 (1984))

Moreover, while respondent may technically be the "custodial" parent, by his own admission the children spend as much, if not more time with petitioner than they do with him:

"My former wife has been

> taking the children three and four nights during the week and two out of three weekends." (Respondent Certification in Support of Motion at a20)

IV As he has done throughout this litigation, respondent has ignored the important issues of law raised by petitioner. Instead he has attempted to deflect the attention of the Court by superfluous statements, totally without documentation of citations from state or federal law, which are irrelevant to the legal inquiry at hand. The very crux of petitioner's case before this Court is the consistent failure of the State courts to follow required procedures, or to apply proper standards under New Jersey law in considering respondent's motion to modify the terms of a final divorce judgment. In his opposing brief, respondent failed to address any of the procedural irregularities raised by

petitioner at pages 15-50 of her petition.

Instead, he claimed that because the Appellate Division chose to overlook what that court called a procedural "irregularity" in petitioner's papers, it had,

> "...bent over backwards to be fair to petitioner." (Opposing brief at pg 7)

In fact, the so-called irregularity, was thoroughly documented in petitioner's reply brief to the Appellate Division. The so-called irregularity (respondent's contention that petitoner's appeal was inconsequential because the merits addressed were those of an order of July 15, 1985 not those of the order of August 9, 1985) was respondent's entire basis of reply to the Appellate Division brief; it was respondent's attempt to confuse the court surrounding numerous sequential events of procedural due process.

Petitioner had contended that the court had misapplied standards for opening a 5 year old judgment of 1980. Respondent contended that the court had not erred in opening the order; however, Respondent referenced the order of July 15, 1985, which he phrased "opened" to allow respondent's "Motion for Reconsideration" of August 2, 1985. It is clear that the only judgment opened was that of 1980; that the only final order of the 1985 litigation was the August 9th Order; and that only <u>final</u> orders are appealable under State law. Petitioner made a timely appeal of that final order of 1985.

What isn't addressed in respondent's opposing brief is the continuing series of procedural irregularities detailed in the petition which resulted in a denial of Due Process to petitioner.

CONCLUSION

Wherefore, petitioner respectfully

requests that her petition for writ of certiorari be granted.

DATED: November 6,1986

DANIEL MARTIN
RD 1 Box 160
Titusville, NJ 08560
Counsel for Petitioner

APPENDIX

SUPERIOR COURT OF NEW JERSEY FAMILY PART: SOMERSET COUNTY DOCKET NO M-8660-79

MAXINE L. MASTROPIETRO
Plaintiff
v.
ROBERT A. MASTROPIETRO
Defendant

STENOGRAPHIC TRANSCRIPT OF EXCERPT OF PROCEEDINGS

PLACE:
Somerset County Court
Somerville, NJ

DATE:
August 2, 1985

BEFORE: THE HONORABLE MICHAEL R. IMBRIANI JSC

TRANSCRIPT ORDERED BY:
Maxine L. Mastropietro

A P P E A R A N C E S:

MAXINE L. MASTROPIETRO
Plaintiff Pro Se

LEROY P. LUSARDI, ESQ.
Attorney for the Defendant

CHARLES R. SENDERS, CSR
OFFICIAL COURT REPORTER
SOMERSET COUNTY COURTHOUSE
SOMERVILLE, NEW JERSEY 08876

PRa1

judgment of divorce whereby he would not move out of the house.

Obviously, as I have indicated, that is a very unusual provision, frankly, in 9 years on the bench.

Obviously, it was very important to Mrs. Mastropietro, very important to Mr. Mastropietro that they both agreed. That is the only reason it was in the judgment.

Now, Mr. Mastropietro says that he'd like to cancel and rescind that provision. Because he has remarried and has additional obligations. That it is something that could not have been anticipated.

I think that when a person divorces today, he should anticipate remarriage and should have thought about that problem.

Mrs. Mastropietro has pointed out that even if the house is small, there can

always be additions made to the house.

For me to unilaterally say to Mrs. Mastropietro that I'm going to void the clause in the paragraph, in the judgment, and require her to travel greater distances to visit with her children, and vice versa, there will come a time when the children will want to visit with her when they are 16 and 17.

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END OF DOCUMENT